TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted]52

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED AUGUST 27, 1918.

(26,727)

(26,727)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 641.

THE MISSOURI, KANSAS AND TEXAS RAILWAY COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Original petition	1	1
Supplemental petition	13	8
General traverse	16	9
Argument and submission of case	16	10
Findings of fact	17	10
Conclusion of law	24	18
Judgment of the court	25	18
Claimant's application for and allowance of appeal	25	18
Certificate	26	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 24, 1918.

1 I. *Original Petition.*

Filed August 18, 1913.

In the Court of Claims of the United States.

No. 32573.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

vs.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Missouri, Kansas & Texas Railway Company, respectfully represents:

I.

That petitioner is a corporation duly organized and existing under the laws of the State of Kansas and owns and operates, and at the times hereinafter stated did own and operate a line of railway extending from Hannibal and St. Louis, Mo., on the north, to the northern boundary of Texas, in the vicinity of Denison, Texas, on the south, and owns and operates also branch lines and ex-
2 tensions from said main line, over which said line and branches petitioner is now, and at all times hereinafter stated was, transporting the United States mails.

II.

That for many years petitioner has transported the United States mails over its road between Kansas City, Mo., and Oklahoma-Texas boundary line near Denison, Texas; Parsons, Kan., and Oklahoma City, Okla., and Sedalia, Mo., and Parsons, Kan., which said portions of its road have been and still are designated by the Post-Office Department as mail routes numbers 153010, 153016, and 155098, respectively.

III.

That by the act of Congress approved March 3, 1873 (17 Stat., 558), making appropriation for the expenses of the Post-Office Department for the fiscal year ending June 30, 1874, the Postmaster General was authorized and directed to readjust the "compensation

for the transportation of mails on railroad routes" on the basis of the average daily weight of mails carried thereover. In regard to the ascertainment of such average daily weight, said act provided:

"* * * the average weight to be ascertained in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

That the above-quoted provision of the act of March 3, 1873, with respect to the ascertainment of the average daily weight of mails carried, remained in effect until the passage by Congress of the act approved March 3, 1905 (33 Stat., 1082, 1088), making appro-

3 priations for the expenses of the Post-Office Department for the fiscal year ending June thirtieth, nineteen hundred and six, wherein it was provided:

"That hereafter before making the readjustment of pay for transportation of mails on railroad routes, the average weight shall be ascertained by the actual weighing of the mails for such a number of successive working days, not less than ninety, at such times after June thirtieth, nineteen hundred and five, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

Under the said acts of March 3, 1873, and March 3, 1905, the Post-Office Department has customarily adjusted the compensation of the mail-carrying railroads, including your petitioner, once in every four years, and in making such adjustments, at all times prior to July 1, 1912, always weighed all of the mails carried on the routes of such railroads.

That during said period from March 3, 1873, to July 1, 1912, it sometimes happened that mails were diverted from one route to another during a quadrennial period, so that the compensation fixed by the previous quadrennial adjustment no longer accurately represented the service actually performed, but that in all such cases no readjustments of compensation were made except upon a weighing of all the mails carried on the routes concerned as required by said acts of March 3, 1873, and March 3, 1905, and in conformity with the provisions thereof; that in such cases readjustments were not made at any time prior to July 1, 1912, upon a weighing of the diverted mails only.

IV.

That each year from the year 1907 down to and including the year 1911 the Postmaster General informed Congress of this condition and recommended remedial legislation. In his report for the fiscal year ending June 30, 1907, said officer stated as follows (p. 25):

4 "Under the law and the present practice compensation for railroad transportation in any one section is not readjusted oftener than once in every four years upon a general weighing of the

mails. General weighings of the mails are expensive, and it has been thought inadvisable to order them more frequently. Neither has it been deemed advantageous to authorize weighings upon routes during a quadrennial term. As a result, when mails are diverted from one route to another during the term, payments continue to be made to railroad companies for the remainder of the term for weights which they have ceased to carry, and there is no existing practice by which the railroad companies carrying such diverted mails may be compensated therefor.

"There should be some practicable and equitable method of readjusting pay in such instances. This could be accomplished best by ascertaining the effect of such diversions by taking the weights of the mails diverted, computing their daily average, and revising accordingly the average daily weights of the routes affected. In such a computation due allowance should be made for the increase in weight of mails subsequent to the general weighing, as it would not be just to subtract this increase from the weight carried by the one company or to credit it to that carried by the other.

"There is a question, however, as to whether the Postmaster General has sufficient authority under existing law to make readjustments in such cases without a new weighing of all the mails carried over the routes affected. In order to remove doubt and to provide a suitable method for such readjustments, I recommend the following legislation by Congress:

"When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of the mails so diverted for such number of successive working days, as he may determine and have the weights stated and verified to him as in other cases, and readjust the compensation upon the routes affected accordingly; Provided, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on either of the routes affected."

Following the recommendations of the Postmaster General, Congress inserted the following provision in the act approved August 24, 1912, making appropriations for the Post-Office Department for the fiscal year ending June 30, 1913:

"Sec. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly; Provided, That no readjustment shall be made unless the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected; Provided further, That readjustment made hereunder shall not take effect before July first,

nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

V.

That for many years it has been the practice and custom of the Post-Office Department to contract with the mail-carrying railroads, including your petitioner, for transporting the United States mails by transmitting to them agreements (otherwise called Distance Circulars) to be filled out, signed, and returned by the railroad companies to said Department.

That in accordance with such practice and following said custom, the Second Assistant Postmaster General, in or about the
6 month of June, 1910, to close the agreements with your petitioner for the transportation by it of the United States mails over its routes aforesaid during the four fiscal years commencing July 1, 1910, mailed to your petitioner with reference to each of said routes a printed form (Distance Circular) on which it was requested that the distances between all stations on the road be stated, and your petitioner's consent to render the service proposed on the basis of those distances and for the compensation therefor to be fixed in accordance with the law and with "the regulations of the Department applicable to railroad mail service" be noted.

The regular form of agreement between the Post-Office Department and your petitioner, covering the routes aforesaid, is printed on page two of said circulars and is in the following words, to wit:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the Department applicable to railroad mail service."

The said agreements with reference to each of said routes were signed by your petitioner's duly authorized official, were returned to the Post-Office Department, and were on file in that Department at the beginning of the contract period for said routes.

That said agreements were based on a previous weighing of all the mails carried over said routes for ninety successive working days beginning February 17, 1910, as a result of which said weighing the Post-Office Department stated the following as the average daily weights of mails transported over said routes.

Route No.	Average daily weight.
153010	35,701 pounds.
153016	3,802 pounds.
155098	7,873 pounds.

7 VI.

That thereafter, in or about the month of August, 1910, the Post-Office Department issued orders for routes Nos. 153010 and 153016 and in or about the month of October, 1910, for route No. 155098, establishing the annual pay of petitioner for transporting the mails

over said routes during the quadrennial period extending from July 1, 1910, to June 30, 1914, as follows:

Route number.	Annual pay.
153010	$192,220.29
153016	31,371.29
155098	31,889.25

That in each of said orders it was stated:

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

That since the making of its agreement aforesaid, petitioner has transported the mails whenever they were tendered to it for transportation and received therefor, down to July 1, 1912, compensation at the above-named rates.

VII.

That at the time of the weighing of the mails carried over the routes aforesaid for the readjustment of petitioner's pay for the quadrennial period from July 1, 1910, to June 30, 1914, petitioner operated a fast-mail train between Kansas City, Mo., and Oklahoma-Texas boundary line near Denison, Texas, which said train received at Vinita, Okla., mails transported over the lines of the St. Louis & San Francisco Railroad Company from St. Louis, Mo., and destined for points west and south thereof.

8 That thereafter, in or about the months of January and April, 1912, said fast-mail train was discontinued and has not been operated by petitioner since said time.

That as a result of the discontinuance of said fast-mail train, the mails formerly received by petitioner at Vinita, Okla., from St. Louis, Mo., and by it distributed over the territory west and south of said last-named city were diverted at said city and have not since said discontinuance been carried by petitioner in the same manner as theretofore.

That after such diversion of the mails, the Postmaster General, purporting to comply with the provisions of section four of the act of August 24, 1912, aforesaid, ordered a weighing of the diverted mails only for the number of successive working days included in the period from November 26, 1912, to December 16, 1912.

That as a result of such weighing, new average daily weights of mail carried over the routes aforesaid were stated as follows:

Route number.	New average daily weight.
153010	33,060 pounds.
153016	3,978 pounds.
155098	11,419 pounds.

That said new average daily weights compare with those theretofore ascertained as a basis for the readjustment for the quadrennial period from July 1, 1910, to June 30, 1914, as follows:

Route number.	New average compared with old.
153010	2,641 — pounds.
153015	175 + pounds.
155098	3,546 + pounds.

That after the ascertainment of said new average daily weights, to wit, on February 21, 1913, the Post-Office Department
9 issued orders readjusting petitioner's compensation for the transportation of the mails over the routes aforesaid from July 1, 1912, as follows:

Route number.	New annual pay.
153010	$181,306.25
153016	31,724.06
155098	37,735.56

That said new annual pay compares with that theretofore established for the quadrennial period from July 1, 1910, to June 30, 1914, as follows:

Route number.	New annual pay compared with old.
153010	$10,914.04 —
153016	352.77 +
155098	5,846.31 +

That since July 1, 1912, petitioner has transported the mails over the routes aforesaid whenever they have been tendered to it for transportation and has been paid therefor at the rates fixed in said order of February 21, 1913; that as a result of such payment, petitioner's compensation for carrying the mails over said routes during the fiscal year ending June 30, 1913, has been unlawfully diminished by the sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96).

VIII.

That immediately upon receipt of notice from the Post-Office Department that a weighing of the mails diverted as a consequence of the discontinuance of petitioner's fast-mail train as aforesaid had been ordered, upon the basis of which petitioner's compensation for carrying the mails over the routes before mentioned would be readjusted, petitioner protested against such weighing and readjustment unless all of the mails carried over said routes should be
10 weighed; that upon the receipt by petitioner, in or about the month of February, 1913, of the orders of the Post-Office Department readjusting petitioner's compensation for services over

said routes, based upon such weighing of the diverted mails only, petitioner made a like formal protest, and that the mail-pay warrants received by petitioner since the issuance of said orders in payment of such services have likewise been accepted under express protest that said readjustment was not lawful and was in excess of the authority conferred upon the Post-Office Department under the Constitution and laws of the United States.

Your petitioner avers that said readjustment was a breach of the agreements entered into by petitioner in or about the month of June, 1910, as aforesaid and consummated by the issuance in the months of August and October as aforesaid of orders by the Post-Office Department establishing petitioner's pay for mail transportation service over the routes herein involved during the quadrennial period from July 1, 1910, to June 30, 1914; that said agreements were made with reference to the laws and lawful departmental regulations then in force and such regulations as might thereafter be promulgated in conformity with the laws then in force; that at the time said agreements were entered into and for many years prior thereto readjustments of the compensation of the mail-carrying railroads, including your petitioner, were always made and could lawfully be made only upon the weighing of all the mails carried on the routes of said railroads; that said act of August 24, 1912, did not become effective until more than two years after said agreements were made and was no part thereof, and that, therefore, said readjustment, effective July 1, 1912, purporting to comply with the provisions of section four of said act, was and is null and void and of no legal effect.

Your petitioner avers that, even conceding the power of Congress to authorize a weighing of diverted mails only during a quadrennial period and the making of a new adjustment of petitioner's
11 compensation based thereon, Congress has not the power to authorize such a weighing and the making of such new adjustment so that the adjustment shall become effective as of a date prior to said weighing, as was done herein, and for this further reason your petitioner avers the readjustment of petitioner's compensation as aforesaid was void and of no legal effect whatsoever.

Your petitioner avers that the sum of $4,714.96 is justly due and owing to it by the United States for mail-transportation service during the fiscal year ending June 30, 1913, the same having been and still being unlawfully withheld from petitioner by the United States and its postal authorities in the manner and for the reasons herein set forth, and that there exists in favor of the United States and against your petitioner no debt, claim, or set-off by which the said amount herein prayed for may or should be reduced.

Your petitioner prays, therefore, that this honorable court will render a judgment in its favor against the United States in the full sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96), the same being due and wholly unpaid.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
By C. E. SCHAFF, *President.*

12 STATE OF MISSOURI,
City of St. Louis, ss:

Before me, the subscriber, a notary public in and for the State and city aforesaid, appeared C. E. Schaff, known to me to be the president of the Missouri, Kansas & Texas Railway Company, and made oath before me that the allegations of said petition are true to the best of his knowledge, information, and belief.

C. E. SCHAFF.

Subscribed and sworn to before me this 12th day of August, A. D. nineteen hundred and thirteen.

[NOTARIAL SEAL.] CHARLES S. BURG,
Notary Public.

My commission expires March 8, 1916.

BRITTON & GRAY,
Attorneys for Claimant.

JOSEPH M. BRYSON,
General Counsel.

13 II. *Supplemental Petition.*

Filed Oct. 25, 1917.

Supplemental Petition.

To the Honorable the Chief Justice and Associate Justices of the Court of Claims:

Your petitioner, the Missouri, Kansas and Texas Railway Company, for its supplemental petition herein respectfully represents to the court as follows:

I.

That it realleges and adopts the allegations of the petition herein.

II.

That for the year from July 1, 1913, to June 30, 1914, petitioner's compensation for transportation of the mails on the routes
14 named in the petition was made, over its continued protest, at the rates fixed in the orders of February 21, 1913, mentioned in the petition.

That by reason of payment at such rates petitioner's compensation for carrying the mails over the routes named in the petition herein during the fiscal year ending June 30, 1914, has been unlawfully diminished by the sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96), which sum is now justly due and owing to claimant.

That no part of said sum has been paid, nor has any part of said claim been assigned, and there exists in favor of the United States and against petitioner no debt, claim, or set-off by which the said sum might or should be diminished.

Wherefore, your petitioner prays for judgment against the United States in the full sum of four thousand seven hundred and fourteen dollars and ninety-six cents ($4,714.96), in addition to the sum prayed for in the original petition herein.

MISSOURI, KANSAS & TEXAS RAILWAY CO.,
By BRITTON & GRAY, *Attorneys.*

DISTRICT OF COLUMBIA, *ss:*

Before me, the subscriber, a Notary Public, in and for the District of Columbia, personally appeared Alexander Britton, to me known and known to me to be a member of the firm of Britton & Gray, Attorneys for the Missouri, Kansas & Texas Railway Company herein, and made oath before me that the allegations of the foregoing supplemental petition are true to the best of his knowledge, information, and belief.

15 Subscribed and sworn to before me this 25 day of Oct., A. D. 1917.

F. C. KLEINSCHMIDT,
Ass't Clerk Court of Claims.

BRITTON & GRAY,
Attorneys for Claimants.

JOSEPH M. BRYSON,
General Counsel.

16 III. *General Traverse.*

Court of Claims.

No. 32573.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

IV. *Argument and Submission of Case.*

On June 5, 1918, this case was argued and submitted on merits by Mr. Alexander Britton, for the claimant, and Mr. Joseph Stewart, for the defendants.

17 V. *Findings of Fact and Conclusion of Law.*

Filed June 17, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

That plaintiff is a corporation duly organized and existing under the laws of the State of Kansas. In January, 1910, and at all times thereafter, claimant owned and operated a line of railway extending from Hannibal and St. Louis, Mo., on the north, to the northern boundary of the State of Texas, in the vicinity of Denison, Tex., with certain branch lines and extensions from said main line, over which line and branches plaintiff was in January, 1910, is now, and at all times since January, 1910, has been transporting the mails of the United States, the mail routes, so far as this case is concerned, being numbered 153010, 153016, and 155098.

II.

The plaintiff was transporting the mails on the routes hereinafter mentioned under terms of the readjustment of compensation which would expire on June 30, 1910. In anticipation of that fact the Postmaster General sent to the plaintiff "Distance circulars," known as Form No. 2504, which it was requested to fill out with certain information called for thereby, and to return the same to the Second Assistant Postmaster General. The plaintiff was requested to send with the distance circulars, among other things, two copies of its latest working schedule showing the trains operated over each of said routes. Plaintiff was also informed that a failure to promptly return the circular might cause a corresponding delay in adjusting compensation. There was a form on the distance circular containing an agreement clause to be signed by a principal officer of the plaintiff reading as follows:

"The company named below agrees to accept and perform mail service upon the conditions prescribed by law and the regulations of the department applicable to Railroad Mail Service."

On or about June 30, 1910, the plaintiff returned said distance circulars to the Post Office Department, together with certain data with

respect to route No. 153010, Kansas City, Mo., to Denison, Tex., and route No. 153016, Parsons, Kans., to Oklahoma City, and route No. 155098, Sedalia, Mo., to Parsons, Kans. The foregoing agreement clause was duly signed by a proper officer of the plaintiff, and
18 to the clause as signed was appended an additional statement "protesting against regulations and practices of the departments," as follows:

1. Against the practice of weighing the mails and readjusting the pay only once in four years as too infrequent to be fair to the railroad.

2. Against furnishing rooms at stations for use of the Post Office Department employees for distribution of mail without payment of rental therefor.

3. Against requiring the company to furnish railway post-office cars except on the following basis:

Full line pay in both directions for the maximum size of car required and demanded by the department over any part of the route, in either direction, and for the full mileage of the natural operating run of the car.

4. Against furnishing space and facilities for distribution of mail on trains without specific and reasonable space pay therefor, in addition to the pay for the transportation of the mail by weight.

5. Against furnishing free transportation except that for railway postal clerks accompanying the mail, as provided in Revised Statutes 4000. (Section 1182, Book of Federal Laws and Regulations, 1902.)

6. Against the carrying of mail between stations and post offices at terminal and intermediate points, and between one railway station and another, and against handling the mail across platforms between the cars and Government contractors' wagons, except at large terminal stations.

7. Against setting mail cars at stations for use as distributing post offices more than a reasonable time necessary for loading, and against holding them at stations after arrival at destination for distribution of unworked mail, without specific pay therefor; and against the practice of the Post Office Department in imposing fines for failures for both, as car pay is authorized on a mileage basis.

8. Against deductions from mail transportation pay for failure of trains to run on routes where six times a week round-trip service has been performed, and against deductions for diverted mails, unless the amount deducted is credited to the carrying company instead of being appropriated by the Post Office Department.

9. Against night exchanges at points where there are no night agents, unless the department provides for the service.

10. Against fining the railway company several months after occurrences for failure of employees at stations or in trains to perform clerical work in connection with the handling of the mail, requesting instead prompt notice for enforcement of governing instructions, and to prevent recurrences.

In the distance circular for route No. 153010 which was returned

by the plaintiff it was represented to the Post Office Department that Vinita, Okla., was a railroad station or point on said route where mails were put on and off trains.

Thereafter, on June 30, 1910, the Second Assistant Postmaster General, acknowledging receipt of said distance circulars, stated to plaintiff that note was taken of the modification made by plaintiff in the agreement clause by which plaintiff excepted to certain orders of the department, and entered "protest against other rules, regulations, or requirements of the department with respect to the
19 performance of service," and that "the department will not enter into contract with any railroad company by which it may be excepted from the operation or effect of any postal law or regulation, and it must be understood that in the performance of service from the beginning of the contract term above named, and during the continuance of such performance of service, your company will be subject, as in the past, to all the postal laws and regulations which are now or may become applicable during the term of this service."

The plaintiff having replied to said notice of June 30, the Second Assistant Postmaster General, on August 12, 1910, again referred to the distance circular for route No. 153010 in a letter addressed to plaintiff or its general agent, and stated:

"I have to advise you that, in the performance of service on this route from the beginning of the contract term named and during the continuance of such performance of service, it must be understood that your company will be subject, as in the past, to the usual customs and practices in relation to railroad mail service as well as to the conditions stated in my letter" of June 30, 1910.

It has for many years been the custom of the Post Office Department to weigh the mails transported by railroads once in every four years, and the compensation was based on the average weights of mail as ascertained by said weighings.

III.

The Postmaster General caused the mails to be weighed on said routes and the average daily weight carried thereon to be computed, and on September 22, 1910, issued an order approving the order of the Second Assistant Postmaster General of September 15, 1910, stating the amount and rate of compensation for the service, as follows:

"Order No. B-17531.—153010—Oklahoma: Kansas City, Mo., and Denison, Tex.; Missouri, Kansas and Texas Railway Co.; 409.61 miles; 33.75 t. a. w.; A. D. W.—35,701 pounds.

"From July 1, 1910, to June 30, 1914, pay the Missouri, Kansas and Texas Railway Company, monthly, for the transportation of the mails between Kansas City, Mo., and Denison, Texas, at the rate of $192,220.29 per annum, being $360.20 per mile for 43.06 miles, Kansas City, Mo., and Paola, Kansas, lap over route 155008, and

$482.09 per mile for 366.55 miles, Paola, Kansas, and Denison, Texas, and for R. P. O. car service at the rate of $37,001.57 per annum, being $82.50 per mile for 94.69 miles, Kansas City, Missouri, and Moran, Kansas, for 2 lines 40-ft., and 1 line 50-ft. cars; $53.75 per mile for 42.13 miles, Moran and Parsons, Kansas, for 1 and ½ lines 40-ft. and ½ line 50-ft. cars; $82.50 per mile for 51.79 miles, Parsons, Kansas, and Vinita, Okla., for 2 lines 40-ft. and 1 line 50-ft. cars; $102.50 per mile for 221 miles, Vinita, Okla., and Denison, Texas, for 2 lines 40 ft., 1 line 50 ft., and ½ line 60-ft. cars.

"This adjustment is subject to future orders, and to fines and deductions, and is based on a service of not less than six round trips per week."

On September 15, 1910, the Second Assistant Postmaster General sent to the railway company a notice of such readjustment of pay, as follows:

20 "The compensation for the transportation of mails, etc., on route No. 153010, between Kansas City, Mo., and Denison, Texas, has been fixed from July 1, 1910, to June 30, 1914 (unless otherwise ordered), under acts of March 3, 1873, July 12, 1876, June 17, 1878, March 3, 1905, and March 2, 1907, upon returns showing the amount and character of the service for a number of successive working days, not less than ninety, commencing Feb. 17, 1910, at the rate of $192,220.29 per annum, being $360.20 per mile, for 43.06 miles Kansas City, Mo., and Paola, Kansas, lap over route 155008, and $482.09 per mile for 366.55 miles, Paola, Kansas, and Denison, Texas, and pay is allowed for use of R. P. O. cars from July 1, 1910, to June 30, 1914, at the rate of $37,001.57 per annum, being $82.50 per mile for 94.69 miles, Kansas City, Mo., and Moran, Kansas, for 2 lines 40-ft. and 1 line 50-ft. cars; $53.75 per mile for 42.13 miles, Moran and Parsons, Kansas, for 1 and ½ lines 40-ft. and ½ line 50-ft. cars; $82.50 per mile for 51.79 miles, Parsons, Kansas, and Vinita, Okla., for 2 lines 40-ft. and 1 line 50-ft. cars; $102.50 per mile for 221.00 miles, Vinita, Okla., and Denison, Texas, for 2 lines 40-ft., 1 line 50-ft., and ½ line 60-ft. cars.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

Like orders were made readjusting the pay on route 153016 on August 9, 1910, and like notice sent to the company on the same date, and on route 155098 on October 5, 1910, and a like notice sent to the railway company on the same date. The average daily weights of mail so ascertained as carried on the two last-mentioned routes and the annual rates of pay fixed by said orders for transportation were as follows: On route No. 153016, 3,802 pounds, $31,371.29; on route No. 155098, 7,873 pounds, $31,889.25.

The plaintiff thereafter carried and continued to carry the mails upon said routes and received the compensation allowed therefor in the foregoing orders of the Postmaster General until July 1, 1912.

IV.

On or about January 20, 1906, the plaintiff notified the Second Assistant Postmaster General that on February 1, 1906, a fast mail train would be established on plaintiff's railway system, leaving Parsons, Kans., daily, and protecting a connection at Vinita, with the Frisco system train No. 3, and proceeding south to Taylor, Tex., there overtaking plaintiff's train No. 5, which would proceed to Houston, Galveston, and San Antonio, Tex., and further stating approximately the time of the new train, and again on January 30, 1906, the plaintiff's duly authorized agent, together with the agent of the Frisco system, filed with the Second Assistant Postmaster General the time table affecting said road and said fast mail train.

On or about March 16, 1906, the plaintiff and the St. Louis & San Francisco Railroad Co., through their proper agents, notified the Second Assistant Postmaster General relative to said new train that the service of said train would "positively be maintained during a period of four years, commencing July 1, 1906," and added that the only proviso which the two railroad companies made was that this official guaranty is predicated upon the continuance of the
21 present rates and regulations affecting compensation, and that in the event of a change only would the railroad companies depart from the above guaranty. The Second Assistant Postmaster General replied that the department understood this written statement to be in confirmation of the statements made by the officers of the company relative to the establishment of said train service and mail service thereon. There was no other agreement with reference to the continuance of such train after June 30, 1910. In January, 1912, said fast mail train was discontinued by the plaintiff, and in April, 1912, the service of said train on the Frisco was discontinued.

V.

In his report to Congress for the fiscal year ending June 30, 1907, The Postmaster General informed Congress that under the law and the then practice compensation for railroad transportation on any one section was not readjusted oftener than once in every four years upon a general weighing of the mails, and that on account of the expense, it has been thought inadvisable to order them weighed more frequently; that as a result "when mails are diverted from one route to another during the term, payments continue to be made to railroad companies for the remainder of the term for weights which they have ceased to carry, and there is no existing practice by which the railroad company carrying such diverted mail may be compensated therefor." He suggested that there should be some practicable and equitable method of readjusting pay in such instances. He further suggested that there was a question as to whether the Postmaster General had sufficient authority under existing law to make readjustments in such cases without a new weighing of all the mail carried over the routes affected, and that in order to remove doubt and pro-

vide a suitable method for such readjustment certain legislation was recommended. The legislation so recommended was substantially enacted as section 4 of the act approved August 24, 1912, making appropriations for the Post Office Department for the fiscal year ending June 30, 1913, as follows:

"Sec. 4. When, after a weighing of the mails for the purpose of readjusting the compensation for their transportation on a railroad route, mails are diverted therefrom or thereto, the Postmaster General may, in his discretion, ascertain the effect of such diversion by a weighing of such mails for such number of successive working days as he may determine, and have the weights stated and verified to him as in other cases, and readjust the compensation on the routes affected accordingly: Provided, That no readjustment shall be made under the diverted mails equal at least ten per centum of the average daily weight on any of the routes affected: Provided, further, That readjustment made hereunder shall not take effect before July first, nineteen hundred and twelve, and shall be for diversions occurring after January first, nineteen hundred and twelve."

VI.

When in January, 1912, the plaintiff withdrew its fast mail trains Nos. 7 and 4 on route No. 153010, there was a discontinuation of mail service on said trains which broke connection at Vinita,
22 Okla., with the said fast mail train of the Frisco system above mentioned, and a consequent delay in a large volume of Texas and Oklahoma mail which had been diverted from other lines to those of the plaintiff, and for which it had received credit by reason of the establishment of said fast mail-train service.

Prior to the readjustment of compensation on said routes for the quadrennial term beginning July 1, 1910, the plaintiff did not notify the Post Office Department that said fast mail-train service would be discontinued, and when the department was notified of the plaintiff's intention to withdraw said fast mail train, the Second Assistant Postmaster General notified the plaintiff that said action would be regarded as a violation of the contract, and would subject the company to a heavy penalty. The plaintiff denied that it had any contract obligating it to operate said train longer.

Because of plaintiff's action in discontinuing said service it became necessary for the Post Office Department to provide for the redispatch of the mails in question over other lines and routes for the purpose of securing prompt delivery thereof, and this was done in March, 1912.

Thereafter, on November 22, 1912, the Second Assistant Postmaster General directed the General Superintendent Railway Mail Service to weigh for a period of 21 days, commencing November 26, 1912, the mails diverted to other lines by reason of the plaintiff's discontinuance of its fast mail trains and those of the Frisco-Missouri, Kansas & Texas fast mail train between St. Louis, Mo., and Denison, Tex., in January and April, 1912. The instructions were

to weigh only such mails as might be definitely identified as having been formerly carried on said routes, and in case of doubt the mail should not be weighed, and the plaintiff was advised of the action taken and that a readjustment of pay from July 1, 1912, would be based thereon.

VII.

After the average daily weights of the diverted mails had been ascertained, the following order was issued by the Postmaster General on March 1, 1913, approving an order of the Second Assistant Postmaster General of February 21, 1913:

"Order No. K-3231.—153010—Oklahoma; Kansas City, Mo., and Denison, Texas; Missouri, Kansas and Texas Railway Company; 409.61 miles; 33.73 trips per week; $192,220.29 transportation; $37,001.57 R. P. O.

"From July 1, 1912, compensation for the transportation of the mails on route No. 153010 is restated at the rate of $181,306.25 per annum, being $334.96 per mile for 43.06 miles, Kansas City, Mo., to Paola, Kansas, lap over route 155008, and $455.28 per mile for 366.55 miles, Paola, Kansas, to Denison, Texas.

"This adjustment is made in accordance with the provisions of section 4 of the act of August 24, 1912, and is due to the diversion of mails at St. Louis, Missouri, resulting from the discontinuance of the Frisco-Missouri, Kansas and Texas fast mail train in January and April, 1912.

"(New average daily weight, 33060 pounds.)"

On February 21, 1913, like orders were made on the other routes involved herein operated by plaintiff. The new average daily
23 weights of mails so ascertained as carried on the other routes and the new annual rates of pay fixed by said orders for transportation were as follows: On route No. 152016, 3,978 pounds, $31,724.06; on route No. 155098, 11,419 pounds, $37,735.56. By letter of February 21, 1913, the Second Assistant Postmaster General notified plaintiff of said readjustments, giving in such notice the copies of the orders so made.

On February 26, 1913, the plaintiff acknowledged receipt of the notice of readjustments, noting the result to said company of such as being a decrease of $10,914.04 on route 153010, and an increase of $581.06 on route 153016, and $5,846.31 on route 155098, and protested against said readjustments.

On March 10, 1913, the Second Assistant Postmaster General replied to plaintiff's letter of February 26, after acknowledging receipt, etc., as follows:

"Note is taken of your statement that your company protests against the readjustment of pay on the routes referred to without a reweighing of all the mails handled on such routes and 'declines to accept the compensation proposed in your letter of the 21st instant. The department is hereby notified that this company will expect compensation under the last quadrennial weighing until such time

as all of the mails handled on such routes are again weighed in accordance with the laws governing same.' In reply to this your attention is invited to the express language of section 4 of the act of August 24, 1912, which provides for a 'weighing of such mails' as have been diverted. The act does not contemplate a weighing of all the mails carried on the routes affected, but merely of the diverted mails. Referring to your statement that your company declines to accept the compensation stated in the adjustment orders, I have to say that such compensation is the maximum that will be paid for service on the routes in question, and the receipt by your company of such compensation is regarded by the Post Office Department as full payment for service rendered.

"With respect to your statement that it can not be determined whether the diverted mails represent 10 per cent of the average daily weight on any route without weighing all of the mail on such route at the same time the diverted mails are weighed, I have to say that this apparently proceeds upon the theory that the law contemplates that the diverted mails shall equal 10 per centum of the average daily weight of each of the routes affected before a readjustment thereon is authorized by the law. The department construes the law to mean that before a readjustment on the routes shall be made it is only necessary that it be determined that the diverted mails equal at least 10 per cent of the average daily weight of any one of the routes involved in the diversion, notwithstanding the diverted mails may not equal 10 per cent of the average daily weight of every route affected.

"With this understanding of the department's construction of the law it is not believed your company will insist that the adjustment was made in violation of the law."

The amount of the mails diverted was in excess of 10 per centum average daily weight on some of the routes affected.

On March 25, 1913, the plaintiff informed the department that warrants covering the pay on routes involved would be accepted under protest. On April 12, following, the Second Assistant Postmaster General replied that the compensation stated in the readjusting orders referred to was the maximum that could be allowed for service on the routes covered, and the receipt by the company of such compensation was regarded by the department as full payment for service rendered thereon.

VIII.

By reason of the discontinuance of the mail trains in question and the consequent necessary diversion of mails to other lines, a number of other readjustments on other lines of railroads were made contemporaneously with those under consideration as a result of said diversions, the net result of which was an increase in the total pay of all roads concerned of $11,727.34 per annum.

Conclusion of Law.

Upon the foregoing findings of fact the court concludes, as a matter of law, that the plaintiff is not entitled to recover. It is therefore adjudged and ordered that the petition be dismissed, with judgment in favor of the United States against the plaintiffs for the cost of printing the record in this cause in the sum of sixty dollars and forty-three cents ($60.43).

25 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington, on the Seventeenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the Missouri, Kansas and Texas Railway Company, as aforesaid, is not entitled to recover, and shall not have and recover any sum in this action of and from the defendants, the United States, and that the petition be dismissed: And it is further ordered, adjudged, and decreed that the United States shall have and recover of and from the Missouri, Kansas and Texas Railway Company, as aforesaid, the sum of Sixty Dollars and forty-three cents ($60.43), the cost of printing the record in this case in this court, to be collected by the Clerk, as provided by law.

BY THE COURT.

VII. *Claimant's Application for and Allowance of Appeal.*

Comes now the Missouri, Kansas & Texas Railway Company, petitioner in the above-entitled cause, and by counsel prays the court to grant an appeal to the Supreme Court of the United States from the decision and judgment of the Court of Claims in favor of the United States dismissing the petition, said decision being rendered June 19, 1918.

BRITTON & GRAY,
Attorneys for Petitioner.

Filed August 16, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

August 22, 1918.

26

Court of Claims.

No. 32573.

THE MISSOURI, KANSAS & TEXAS RAILWAY COMPANY

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause of the argument and submission of case; of the findings of fact and conclusion of law; of the judgment of the court; of the claimant's application for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington this Twenty-third day of August, A. D. 1918.

[Seal of Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,727. Court of Claims. Term No. 641. The Missouri, Kansas & Texas Railway Company, appellant, vs. The United States. Filed August 27th, 1918. File No. 26,727.